No. 91-2019

In The
Supreme Court of the United States
October Term, 1992

STATE OF MINNESOTA,
Petitioner,

vs.

TIMOTHY EUGENE DICKERSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF MINNESOTA

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL SHERIFFS' ASSOCIATION, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, THE STATES OF ALASKA, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, DELAWARE, FLORIDA, INDIANA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VIRGINIA, VERMONT,* THE DISTRICT OF COLUMBIA,* PUERTO RICO,* THE SECOND JUDICIAL DISTRICT OF THE STATE

(List of Amici Continued on Inside Front Cover)

OF NEW MEXICO,* ALABAMA DISTRICT ATTORNEYS ASSOCIATION, PROSECUTING ATTORNEY'S COUNCIL OF GEORGIA, KANSAS COUNTY AND DISTRICT ATTORNEYS ASSOCIATION, MASSACHUSETTS DISTRICT ATTORNEYS ASSOCIATION, PROSECUTING ATTORNEY'S ASSOCIATION OF MICHIGAN, THE MINNESOTA COUNTY ATTORNEYS ASSOCIATION, PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION, SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION, TENNESSEE ATTORNEY GENERAL CONFERENCE, DEPARTMENT OF STATE'S ATTORNEYS FOR THE STATE OF VERMONT, VIRGINIA ASSOCIATION OF COMMONWEALTH'S ATTORNEYS, AND WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS,
IN SUPPORT OF THE PETITIONER
STATE OF MINNESOTA.

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This Brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules. Consent is not required for *amici* states and other political entities pursuant to Rule 37.5.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States and over thirty-five times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The National District Attorneys Association (NDAA), is a non-profit corporation and the sole **national** organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens.

The various state prosecuting attorneys associations that have joined this brief share organizational goals and interests similar to **NDAA**.

States sponsored by their attorney general have joined this brief, as has the District of Columbia, sponsored by its Corporation Counsel, the Commonwealth of Puerto Rico, sponsored by its Solicitor General, and the Second Judicial District of the State of New Mexico, sponsored by the District Attorney.

***Amici* are states, the District of Columbia, the Commonwealth of Puerto Rico, the Second Judicial District of the State of New Mexico, law enforcement officials, and professional associations representing the interests of law enforcement agencies at the state and local levels.** Our members include: (1) attorneys general, other counsel, and prosecutorial officials at the state and local levels who are constitutionally and statutorily engaged in the prosecution of criminal cases, including issues such as those involved in this case; (2) law enforcement officers and law enforcement administrators who are charged with the responsibility of adopting and implementing guidelines for the conduct of detentions for investigation; and (3) police legal advisors and other counsel who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with the law of arrest, search and seizure, and detention for investigation purposes, and to prosecute cases involving evidence obtained thereby.

Because of the composition of our constituencies, constitutional and statutory duties, and relationship with our members—including active law enforcement administrators and counsel at the state and national level—**we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.** We are especially concerned about the impact of the ruling below on the safety of law enforcement officers as they conduct often volatile street stops for investigation. We respectfully ask this Court to consider this information in reaching its decision in this case.

Amici are governmental officials, as well as state and national associations, and our perspective is broad. This Brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding police conduct in the law of stop and frisk. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these, especially the officer safety issue.

Counsel of Record for *amici curiae*, James P. Manak, Esq., has reviewed the facts of this case and has conferred with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues that are not otherwise raised.

STATEMENT OF FACTS

The Minnesota Supreme Court ruled in *State v. Dickerson*, 481 N.W.2d 840 (Minn. 1992), that the Fourth Amendment does not admit of a "plain feel" exception to the warrant requirement that would permit a police officer, during the frisk of a suspect for weapons, to retrieve and seize a hard pea-like object on the suspect's person, which felt to the officer like crack cocaine when he touched it through the suspect's clothing. The officer in question, a 14-

year veteran with extensive narcotics experience, stopped the Respondent, hereinafter referred to as "defendant," as he walked away from a known "crack house" and attempted to flee at the sight of the police. When the officer felt the object as part of a proper frisk, he "was absolutely sure" it was crack cocaine in a cellophane package, based upon his experience with similar material in approximately 50 to 75 instances.

Three Justices of the Supreme Court of Minnesota dissented.

ARGUMENT

THE FOURTH AMENDMENT PERMITS A "PLAIN FEEL" EXCEPTION TO ITS WARRANT REQUIREMENT FOR SEIZURES OF OBJECTS, IN A SITUATION IN WHICH A POLICE OFFICER DEVELOPS, THROUGH THE SENSE OF TOUCH DURING A LAWFUL PAT DOWN, PROBABLE CAUSE TO BELIEVE THAT THE SUSPECT POSSESSES CONTRABAND OR OTHER EVIDENCE OF A CRIME.

The issues in this case are relatively simple. There is no question, and the courts below found, that the officer had reasonable suspicion for the stop and frisk under *Terry v. Ohio*, 392 U.S. 1 (1968), *Pennsylvania v. Mimms*, 394 U.S. 106 (1970), *United States v. Cortez*, 449 U.S. 411 (1981), and *Michigan v. Long*, 463 U.S. 1032 (1983). **The only question here is whether the officer could develop, through a sense of touch during a lawful pat down of a suspect, facts that establish probable cause for a search.** If so, the plain view doctrine becomes applicable and evidence is thereby admissible at trial. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), *Texas v. Brown*, 460 U.S.

730 (1983), and *Horton v. California*, __ U.S. __, 110 S.Ct. 2301 (1990).

The court below was reluctant to accord the same value to the sense of touch as that accorded to the other five senses by the majority of courts that have considered application of the plain view doctrine. Its concern—not founded on case law or scientific proof—is stated succinctly at 481 N.W.2d 840, 845 (Minn. 1992):

> Because we do not believe the senses of sight and touch are equivalent, we decline to extend the plain view doctrine to the sense of touch.

The majority of the courts that have considered the precise issue have rejected that position. See, *e.g.*, *United States v. Buchannon*, 878 F.2d 1065, 1066-67 (8th Cir. 1989), and *State v. Washington,* 134 Wis.2d 108, 396 N.W.2d 156, 161-62 (1986). It is certainly not founded on precedents in this Court's Fourth Amendment jurisprudence (indeed this Court, in effect, approved the sense of touch in *Terry v. Ohio, supra*, for a full-blown search after a proper frisk), nor in scientific evidence as a deprivation of the value of information obtained by the sense of touch.

The foremost authority on Fourth Amendment jurisprudence summarizes the legal rule on this subject thusly:

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. **There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable cause.** (emphasis added).

LaFave, *Search and Seizure*, (2nd ed. 1987) § 9.4(c) at 524. Also see, Holtz, "The 'Plain Touch' Corollary: A Natural

and Foreseeable Consequence of the Plain View Doctrine," 95 *Dickinson Law Rev.*, 521 (1991).

Amici submit that the information developed by a 14-year veteran officer who had felt (and confirmed) the presence of the same sort of contraband object up to 75 times prior to his confrontation with the defendant was more than sufficient to apply this Court's ruling in *Michigan v. Long*, 463 U.S. 1032, at 1050:

> If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 2037, 29 L.Ed.2d 564 (1971); *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978); *Texas v. Brown*, 460 U.S. at 739, 103 S.Ct., at 1541 (plurality opinion by Rehnquist, J.); *id.*, at 746, 103 S.Ct. at 1545 (Powell, J., concurring in the judgment).

Certainly the officer's senses gave him probable cause as surely as probable cause exists when a trained dog's sense of smell indicates the presence of narcotics, as approved by this Court in *United States v. Place*, 462 U.S. 696 (1983).

We submit that the statement of the dissenting Justices in the court below best summarizes this case:

> It is well to remind ourselves occasionally that **"[l]aw enforcement is not a game in which liberty triumphs whenever the policeman is defeated."** E. Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 Calif. L.Rev. 565, 582 (1955). Certainly, evidence obtained as the result of any unreasonable search or seizure should be excluded. **But a policeman should not be compelled to ignore what his senses— whether**

sight, sound, smell, taste, or touch—tell him in clear and unmistakable language. (emphasis added).

State v. Dickerson, 481 N.W.2d 840, 851 (Minn. 1992).

There is yet another issue in this case that *amici* wish to address—**officer safety.**

Law enforcement officers are daily faced with highly dangerous street scenarios under their *Terry v. Ohio* common law powers of detention for investigation. We can say unequivocally, **based upon our experience as law enforcement officials and representatives,** that to adopt a rule that tells the police that some forms of their senses with respect to probable cause information during potentially dangerous street confrontations are "good," while other forms are "not good," will not only confuse officers but **will cause them to hesitate under circumstances that could cost them their lives.**

Not only would such a rule defy common sense, it would also be the very opposite of the "bright line" approach that this Court has wisely followed for Fourth Amendment jurisprudence. *Amici* respectfully submit that this Court should not choose that path, one founded on neither scientific evidence, case law, nor any semblance of common sense.

CONCLUSION

Amici urge this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

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